

1940

Frank S. Naylor v. Rachel H. Jolley, Hugh E. Jolley
and William S. Jolley, Executors of the Last Will and
Testament of Reuben G. Jolley, Deceased; Frances
Marion Jolley, Henry C. Jolley, Lila Jolley Muelstein,
Leo V. Jolley, Pearl Jolley Daniels, Hugh K. Jolley
and William S. Jolley : Abstract of Record

Utah Supreme Court

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Christenson and Christenson; Attorneys for Respondents; J. D. Skeen and E. J. Skeen; Attorneys for Appellant;

Recommended Citation

Abstract of Record, *Naylor v. Jolley et al*, No. 6232 (Utah Supreme Court, 1940).
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FRANK S. NAYLOR,

Appellant,

vs.

RACHEL H. JOLLEY, HUGH E.
JOLLEY and WILLIAM S. JOL-
LEY, Executors of the Last Will
and Testament of REUBEN G.
JOLLEY, Deceased; FRANCES
MARION JOLLEY, HENRY C.
JOLLEY, LILA JOLLEY MUEL-
STEIN, LEO V. JOLLEY, PEARL
JOLLEY DANIELS, HUGH K.
JOLLEY and WILLIAM S. JOL-
LEY,

Respondents.

No. 6232

ABSTRACT OF RECORD

CHRISTENSON AND CHRISTENSON,
Attorneys for Respondents.

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[TITLE OF COURT AND CAUSE]

COMPLAINT

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Plaintiff complains of the defendants and for
cause thereof alleges:

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That on the 19th day of February, 1930, Rueben G. Jolley and Rachel H. Jolley represented to plaintiff that they were the owners entitled to possession and in possession of the following described real estate located in Utah County, Utah, to-wit:

All of Lots 1, 2, 3, 4, 5, 6, 7 and 8; the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of the $NW\frac{1}{4}$; the $NW\frac{1}{4}$ of the $SE\frac{1}{4}$; the $NW\frac{1}{4}$ of the $SW\frac{1}{4}$ of Sec. 32, all in Tp. 7 S. R. 4 E. S. L. M., containing 481.33 acres, more or less, except, however, that part thereof, described as follows, to-wit: Commencing at the SW corner of Lot 8. Sec. Tp. and Range aforesaid, and running thence E. along the S. line of said Sec. 32, 12.52 chs. to the W. line of Private Land Grant known as Special Section No. 69; thence N. along the W. line 12.12 chs. to the NW corner of said Special Section 69; thence S. $67^{\circ}45'$ W. 13.53 chs. to the S. line of said Sec. 32; thence S. $0^{\circ}04'$ E. along the W. line of said Sec. 32; 7 chs. to the place of beginning, and containing 11.97 acres, more or less. Also all of Special Sections 71 and 72, in Sec. 33, Tp. 7 S. R. 4 E. S. L. M., containing 317.32 acres, more or less. Together with all rights, privileges and appurtenances thereunto belonging, or in any wise appurtenant, or used in connection therewith. And together with all water and water rights belonging thereto or used in connection therewith, and especially 25 shares of the Capital Stock of the Springville Irrigation Company, now represented by certificate No. 151.

and the said Rueben G. Jolley and Rachel H.

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Jolley, so representing themselves as the owners of said property, offered to sell the same to plaintiff, and thereupon plaintiff and the said Rueben G. Jolley and Rachel H. Jolley entered into a contract in writing whereby the said Rueben G. Jolley and Rachel H. Jolley agreed to sell to plaintiff and plaintiff agreed to buy the real estate hereinabove described. A copy of said contract is attached hereto, marked Exhibit "A" and made a part of this complaint. Immediately upon the execution and delivery of the said contract, plaintiff paid to the said Rueben G. Jolley and Rachel H. Jolley the sum of \$2000.00 and entered into the possession of all of said property excepting 93.87 acres hereinafter described, and thereafter, from time to time, plaintiff paid on account of the purchase price of said property additional sums of money aggregating \$2561.33. In all, plaintiff made payment to the said sellers the sum of \$4561.33, of which sum, \$2000.00 was paid on the 19th day of February, 1930, as agreed in the said contract, \$882.50 was paid by plaintiff to said sellers on or about the 28th day of January, 1932, and \$1678.83 was paid more than 4 years prior hereto.

Plaintiff further alleges that the said property was in need of fencing and improvements and accordingly, after entering into the possession pursuant to said contract, Exhibit "A," plaintiff built one mile of wire fence at a cost to him of

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\$441.00, erected one livestock barn at a cost to him of \$1500.00, repaired the dwelling house upon said property at a cost to him of \$150.00, cleared brush from said land at a cost to him of \$500.00, and during the year 1937, expended in preparing land for seeding and in maturing crops the sum of \$1000.00. Improvements of said land were of a permanent character and increased the value of said land to the extent of the cost thereof, and the cost of said improvements to plaintiff was the reasonable cost thereof.

Plaintiff further alleges that the said Rueben G. Jolley and Rachel H. Jolley were not the owners of all of said land and were not in exclusive possession of all of the same, and never at any time became the owners of or acquired the right to convey the following described part of said real estate, to-wit:

Beginning N. 04' W. 7. chs. from the SW corner of Sec. 32, Tp. 7 S. R. 4 E. S. L. B. & M; thence N. 67 45' E. 13.53 chs; thence N. 65 55' E. 0.92 chs; thence N. 67.50 chs. to the N. boundary of said Sec. 32; thence W. 13.36 chs. to the NW corner of said Sec. 32; thence S. 73.00 chs. to the place of beginning, containing an area of 93.87 acres more or less.

The said Rueben G. Jolley and Rachel H. Jolley failed and refused to furnish and deliver to plaintiff on or before October 1, 1930 or at any other time an abstract of title to said property showing the fee and unencumbered and market-

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able title thereto in Rueben G. Jolley and Rachel H. Jolley.

Plaintiff further alleges upon information and belief that the said Rueben G. Jolley and Rachel H. Jolley refused to furnish an abstract of title to said property for the reason that the title thereto was not clear and they were not the owners and were unable to acquire title to the said 93.87 acres of land hereinabove described.

The said Rueben G. Jolley and Rachel H. Jolley became and continued in default in the performance of the obligations of the said contract to be performed by them from the date of said contract up to and including the date of the death of the said Rueben G. Jolley on or about the month of October, 1933, and while the said sellers of said property were so in default, the defendants Hugh K. Jolley and William S. Jolley, as executors of the last will and testament of Rueben G. Jolley, deceased, and the said Rachel H. Jolley on or about the 16th day of March, 1936 and on numerous occasions thereafter served notice upon plaintiff that they intended to and did rescind and cancel the said contract of sale, and on or about the 19th day of September, 1937, during the absence from said property of plaintiff and while said property was in the possession of plaintiff's agents and tenants, the said Hugh K. Jolley and William S. Jolley, as executors of the last will and testament of Rueben G. Jolley, deceased, and

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Rachel H. Jolley, by force, threats and intimidation drove plaintiff's agents and tenants from said land and took possession of the whole thereof, excepting only the said 93.87 acres not owned by the said defendants or any of them, and the said Hugh K. Jolley and William S. Jolley and Rachel H. Jolley took and appropriated to their own use all crops harvested and stacked and stored upon the said premises and all unharvested crops growing thereon, which were of a value of \$1000.00 and have since retained sole and exclusive possession thereof.

The said Rueben G. Jolley died on or about the month of October, 1933, and upon petition the above entitled Court, probate division, made and entered an order admitting the will of the said Rueben G. Jolley to probate and appointing Hugh K. Jolley and William S. Jolley executors of the land will and testament of the said Rueben G. Jolley, deceased, and the individual defendants herein named, are the beneficiaries under the will of the said Rueben G. Jolley and his heirs at law, and assert some right, title and interest in and to the subject matter of this litigation, and by reason thereof are made parties defendant herein.

WHEREFORE plaintiff prays judgment as follows as against the said Hugh K. Jolley and William S. Jolley as executors of the last will and testament of Rueben G. Jolley, deceased, and Rachel H. Jolley:

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1. For the sum of \$4561.33 with interest at the rate of 8% per annum upon \$2000.00 of said amount from the 19th day of February, 1930; with interest upon \$882.50 of said amount at the rate of 8% per annum from the 28th day of January, 1932; with interest on \$1678.83 of said amount at the rate of 8% per annum for the period of 4 years. For the sum of \$2591.00 for permanent improvements upon the land first hereinabove described, with interest thereon at the rate of 8% per annum from the 19th day of February, 1931, and for the sum of \$1000.00 for the conversion of crops upon said property in 1937.

1 2. That the judgment herein prayed be adjudged and decreed to be a first and prior lien upon all of the property first described in the complaint herein excepting the 93.87 acres, and if not paid within a reasonable time, that the said property be sold free of all claims of every character held or claimed by the defendants herein, according to the law and practice of the court and the proceeds of said sale, after deducting proper and necessary costs be applied in payment or part payment of the judgment so entered.

3. Plaintiff prays for general relief including costs.

Duly verified and filed September 1, 1938.

J. D. SKEEN, E. J. SKEEN,

Attorneys for Plaintiff.

Exhibit "A"

AGREEMENT

THIS AGREEMENT, made in duplicate this 19th day of February, 1930, A. D. 1930, by and between R. G. Jolley and Rachel H. Jolley, his wife, of Utah County, State of Utah, the parties of the first part, and Frank S. Naylor, of Salt Lake City, State of Utah, the party of the second part; WITNESSETH: that the parties of the first part agree to sell and convey to the party of the second part, his heirs or assigns, and the said party of the second part agrees to purchase, the following described property, situated in the County of Utah, and State of Utah, to-wit: All of Lots 1, 2, 3, 4, 5, 6, 7 and 8; the West $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the Northwest $\frac{1}{4}$; the Northwest $\frac{1}{2}$ of the Southeast $\frac{1}{4}$; the Northwest $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section 32, all in Township 7 South of Range 4 East of Salt Lake Meridian, containing 481.33 acres, more or less, except, however, that part thereof, described as follows, to-wit: Commencing at the Southwest corner of Lot 8, Section, Township and Range aforesaid, and running thence East along the South line of said Section 32, 12.52 chains to the West line of Private Land Brant known as Special Section No. 69; thence North along the West line 12.12 chains to the Northwest corner of said Special Section 69; thence South 67 45' West 13.53 chains to the West

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line of said Section 32, thence South 0 04' East along the West line of said Section 32, 7 chains to the place of beginning, and containing 11.97 acres, more or less.

Also: All of Special Sections 71 and 72, in Section 33, in Township 7 South of Range 4 East of Salt Lake Meridian, containing 317.32 acres, more or less.

Together with all rights, privileges and appurtenances thereunto belonging, or in any wise appertaining, or used in connection therewith.

And together with all water and water rights belonging thereto or used in connection therewith, and especially 25 shares of the Capital Stock of the Springville Irrigation Company, now represented by certificate No. 151.

6 Second party agrees to pay for said property the sum of Eight Thousand (8000) Dollars, as follows, to-wit: Two Thousand (2000) Dollars, upon the signing and delivery of this agreement, the receipt of which is hereby acknowledged, and the balance Six Thousand (6000) Dollars, to be paid as follows, to-wit: One Thousand (1000) Dollars on or before the 30th day of November, A. D. 1931, and One Thousand (1000) Dollars or more on or before the 30th day of November, 1932, and One Thousand (1000) or more Dollars on or before the 30th day of each and every November until the full amount shall have been paid, together with interest thereon at the rate of six per

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cent per annum on all deferred payments, said interest payable yearly until the full amount has been paid.

It is distinctly understood and agreed that the interest is not included in the above \$1000.00 but is in addition thereto.

Second party to have possession and the use, benefit and rentals of said property February 19, 1930, and thereafter so long as he complies with the terms of this agreement, but upon a failure to comply with the same his right to possession with terminate, and the payment made, may at the option of the parties of the first part, be declared forfeited, and this agreement shall be null and void, 60 days grace is hereby given.

First parties agree to furnish, at their own expense, and deliver same to second party, on or before October first 1930, an Abstract of title to said property continued to date, and showing the fee and unencumbered, marketable title thereto in said first parties, and said second party shall be entitled to 30 days after same is furnished in which to examine and accept the title thereto.

Should the abstract to said property disclose any clouds of defects in the title, the attorney of the second party to be the judge as to whether or not there are any clouds or defects in the title, said first parties agree to clear any and all such clouds or defects from said title at their own expense within and before the first day of Oct., 1930.

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First parties agree to convey to said second party, his heirs or assigns, an absolute and indefeasible estate, by Warranty Deed, the fee simple title to said premises free and clear of all encumbrances, including taxes for the year 1929, and the first parties to pay all special taxes if any are now existing against said property.

IN WITNESS WHEREOF, the said parties have hereunto set their hands in duplicate, the day and year first above written.

R. G. JOLLEY
RACHEL H. JOLLEY
FRANK S. NAYLOR

Signed in the presence of:

HUGH JOLLEY
EDITH JOLLEY

Duly acknowledged on the 18th day of July,
A. D., 1930.

STEPHEN S. MOYLE
Notary Public.

[TITLE OF COURT AND CAUSE]

ANSWER

17 Come now the defendants, Rachel H. Jolley, and Hugh K. Jolley and William S. Jolley, as Executors of the Last Will and Testament of Reuben G. Jolley, deceased, and in answer to the plaintiff's complaint, admit, deny, and allege as follows:

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1. Answering the first unnumbered paragraph of plaintiff's complaint, these defendants admit that on or about the 19th day of February, 1930, Reuben G. Jolley and Rachel H. Jolley offered to sell certain lands to the plaintiff, which lands are described in the contract entered into between said Reuben G. Jolley and Rachel H. Jolley, his wife, and the plaintiff, Frank S. Naylor, on the 19th day of February, 1930, a copy of which contract is attempted to be set forth in Exhibit A attached to plaintiff's complaint, but these defendants deny that said Exhibit A is a correct copy of said contract; these defendants admit that in the contract executed between the plaintiff, Frank S. Naylor, and Reuben G. Jolley and Rachel H. Jolley, on the said 19th day of February, 1930, it is alleged that the plaintiff paid to said Reuben G. Jolley and Rachel H. Jolley the sum of Two Thousand Dollars, but these defendants deny that the sum of Two Thousand Dollars in full ever was paid to said Reuben G. Jolley and Rachel H. Jolley, or either of them, as in said contract alleged. These defendants further admit that after the said Reuben G. Jolley and Rachel H. Jolley and Frank S. Naylor had entered into the contract for the sale of the lands hereinafter more particularly mentioned, the said plaintiff entered into the possession of the same, except 93.87 acres thereof; these defendants further admit that thereafter from time to time the plaintiff

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paid on account of the purchase price of said property additional sums, but as to the balance of said unnumbered paragraph, these defendants deny the same.

2. Answering the second unnumbered paragraph of plaintiff's complaint, these defendants admit that said plaintiff built, or caused to be built, some wire fence and also caused to be erected a barn which was erected in place of one located upon the premises at the time the plaintiff took possession of the same, and which was burned, and that for a portion of the money received for insurance said barn was erected; these defendants deny that they have any knowledge or information sufficient to form a belief as to the extent of any brush cleared from said land, and as to any expenditure made by the plaintiff in the preparation of the land for seeding and maturing crops, and for that reason and upon that ground they deny the same; these defendants admit that some improvements placed upon the land were of a permanent character, but deny that they increased the value of the land over and above what the same was when the said plaintiff took possession thereof; that as to the balance of said unnumbered paragraph 2, these defendants deny the same.

3. Answering unnumbered paragraph 3 of said complaint, these defendants admit that Reuben G. Jolley and Rachel H. Jolley were not the

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owners of a portion of the lands described in said contract of sale entered into on February 19, 1930, and that they were not in the exclusive possession of all said lands described in said agreement, but in connection therewith, these defendants allege that by a subsequent agreement with the plaintiff, said Reuben G. Jolley and Rachel H. Jolley, for a valuable consideration, agreed with said plaintiff, and by the terms of said agreement, said plaintiff, Frank S. Naylor, and said Reuben G. Jolley and Rachel H. Jolley settled with respect to any and all deficiencies of title to the lands set out and described in said contract of February 19, 1930, and the said Frank S. Naylor has no cause whatever to complain with respect to any deficiency in the title to any of said lands.

4. Answering unnumbered paragraph 4, these defendants deny the same, and the whole thereof, but in this connection they allege that after the date of the original contract entered into between Reuben G. Jolley and Rachel H. Jolley and the plaintiff, Frank S. Naylor, certain modifications to said original contract were agreed upon, as will hereafter be shown, by contract modifying said original agreement.

5. Answering unnumbered paragraph 5 of plaintiff's complaint, these defendants admit that said Reuben G. Jolley and Rachel H. Jolley did not acquire title to the said 93.87 acres of land described in plaintiff's complaint, but in this con-

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nection they allege that for a valuable consideration a subsequent agreement was entered into between said Reuben G. Jolley and Rachel H. Jolley with the plaintiff, Frank S. Naylor, wherein and whereby said Frank S. Naylor agreed to a modification of said original agreement, and that said original agreement was thereby modified so that said 93.87 acres was eliminated from said contract, which will more fully appear hereinafter.

6. Answering unnumbered paragraph 6 of plaintiff's complaint, these defendants admit that at various times these answering defendants served notice upon the plaintiff that they would terminate and cancel the said contract entered into between the plaintiff and Reuben G. Jolley and Rachel H. Jolley, his wife, on account of the defaults of the plaintiff in complying with said contracts, and declare the same, and the payments made thereunder, forfeited, unless said contracts should be performed and complied with; they admit that they later took possession of said premises in the year 1937, but as to the balance of said paragraph, they deny the same, and the whole thereof.

7. Answering unnumbered paragraph seven of plaintiff's complaint, these defendants admit that Reuben G. Jolley died about the time alleged in said paragraph, and that the Last Will and Testament of said Reuben G. Jolley was admitted to probate, and that Hugh K. Jolley and William S.

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Jolley were appointed executors of the Last Will and Testament of said Reuben G. Jolley, and further admit that the individual defendants are beneficiaries under the said Will of Reuben G. Jolley, and are his heirs at law, and they further admit that these answering defendants individually claim some interest in the subject matter of the property involved in this action.

8. These defendants deny generally and specifically each and all of the allegations of said complaint not herein specifically admitted or denied.

As a further Answer to plaintiff's complaint and an affirmative defense thereto, these answering defendants allege:

1. That any claim or demand that the said plaintiff may have had or claim against Reuben G. Jolley, otherwise called R. G. Jolley, deceased, is wholly barred, for the reason that the said plaintiff has never filed or presented any claim against the estate of said Reuben G. Jolley, otherwise called R. G. Jolley, deceased, and that the time for presentation of claims has long since expired.

As a further Answer and affirmative defense to plaintiff's complaint filed herein, these answering defendants allege:

1. That on or about February 19, 1930, Reuben G. Jolley, otherwise called R. G. Jolley, and his wife, Rachel H. Jolley, entered into a contract

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for the sale of certain property in Utah County, State of Utah, described in said contract, a copy of which contract is hereto attached and marked Exhibit A, and hereby referred to and made a part hereof.

2. That thereafter, to-wit: on or about January 28, 1932, said Reuben G. Jolley, otherwise called R. G. Jolley, and Rachel Jolley, otherwise called Rachel H. Jolley, and the above-named plaintiff, Frank S. Naylor, entered into a memorandum of agreement as a modification of said original agreement dated February 19, 1930, a copy of which memorandum of agreement is hereto attached, marked Exhibit B, and hereby referred to and made a part hereof.

3. That on the same day, to-wit: January 28, 1932, said R. G. Jolley, otherwise called Reuben G. Jolley, and R. H. Jolley, otherwise called Rachel H. Jolley, entered into a further agreement with said Frank S. Naylor for the modifying of said agreements herein, marked Exhibits A and B, and further agreeing as between themselves upon the amount due from the plaintiff herein, Frank S. Naylor, to the said Reuben G. Jolley and Rachel H. Jolley, after giving said Frank S. Naylor, plaintiff herein, credit for certain items claimed by said plaintiff herein, and at which time the amount due to Reuben G. Jolley and Rachel H. Jolley, was determined and agreed upon up to that date, a copy of which supplemen-

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tal agreement is hereto attached, marked Exhibit C, and hereby referred to and made a part hereof.

4. That the said Reuben G. Jolley and Rachel H. Jolley during the lifetime and until the death of the said Reuben G. Jolley complied with and carried out all the terms of the said agreements between the said parties and said Frank S. Naylor, and that since that time these answering defendants have fully complied with all the terms of the said contract and the modifications thereof, to be kept and performed by them, as hereinabove set out.

5. That the said plaintiff, Frank S. Naylor, paid the amount agreed upon as being due to said date, January 28, 1932, from the said plaintiff, as set out in Exhibit C, attached hereto, but thereafter he failed and refused to comply with said contracts or to make the payments as specified therein, and failed to pay the taxes on the said premises, and compelled these defendants to pay such taxes in order to protect the title to said property, although demand was frequently made of said plaintiff to make said payments and to comply with said contract, but that he at all times failed and refused to do so.

6. That on or about March 11, 1937, said plaintiff having failed and refused to make the payments, as provided in the contract between said plaintiff and said Reuben G. Jolley and Rachel H. Jolley, demand was made upon said plaintiff to make payments under said contract.

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Said notice was served upon said Frank S. Naylor by these answering defendants, and a copy of which notice is hereto attached, marked Exhibit D, and hereby referred to and made a part hereof.

7. That thereafter, to-wit: on or about May 20, 1937, said plaintiff not having complied with the demands of said notice heretofore referred to, these answering defendants, served upon said Frank S. Naylor, plaintiff herein, a notice, a copy of which is hereto attached, marked Exhibit E, and hereby referred to and made a part hereof.

8. That again on the sixteenth day of August, 1937, said plaintiff, Frank S. Naylor, having failed and refused to make the payments as required by said contract between said Reuben G. Jolley, and Rachel H. Jolley, a notice was served upon said plaintiff, a copy of which notice is hereto attached, marked Exhibit F, and hereby referred to and made a part hereof.

9. That on or about the seventeenth day of September, 1937, notice was served upon said plaintiff herein advising and notifying said plaintiff that on account of his failure to make the payments, as required by the contract between the plaintiff and the said Reuben G. Jolley and Rachel H. Jolley, as hereinbefore mentioned, that the executors of the Last Will and Testament of said Reuben G. Jolley, deceased, and said Rachel H. Jolley had elected to declare and that they had

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declared the said contract entered into, as hereinbefore stated, under date of February 19, 1930, and contracts supplementary thereto, terminated, and the payments made thereunder forfeited, and made demand upon the said plaintiff for the possession of the said premises, a copy of which notice is hereto attached, marked Exhibit G., and hereby referred to and made a part hereof.

10. That thereafter, to-wit: on or about the twentieth day of October, 1937, these answering defendants demanded possession of said premises of U. Terasawa, Y. Tsunekazu, and Theodore Mandoza, who were in possession thereof, as these answering defendants are informed and believe, as the tenants of said plaintiff, and thereafter the possession of said premises was peaceably surrendered to these answering defendants, and these defendants ever since said time have continued in the possession of the premises without any interference on the part of the plaintiff.

11. That said plaintiff at no time has claimed or demanded the repossession of these premises from these answering defendants, and at no time has he ever paid, or offered to pay, the amount due under said contracts to these answering defendants, or to any of them, or at all.

12. That at all times until these answering defendants, due to the failure of the plaintiff to comply with the contract, elected to, and did, terminate said contract and take possession of said

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premises, these answering defendants were willing and able to comply with said contract and so notified the plaintiff, but at no time did the plaintiff comply with, or offer to comply with, said contract after on or about January 28, 1932.

13. That under the terms of said contract between the plaintiff and the said Reuben G. Jolley and Rachel H. Jolley, and the modifications thereof, it was provided, among other things, as follows:

“Second Party to have possession and the use, benefit, and rentals of said property, February 19, 1930, and thereafter, so long as he complies with the terms of this agreement, but on the failure to comply with the same, his right to possession will terminate and the payments made, may, at the option of the parties of the First Part, be declared forfeited, and this agreement shall be null and void. Sixty days grace is hereby given.”

14. That, in accordance with said provision of said contract, these answering defendants elected to declare said contract null and void and terminate the same, and in accordance therewith took possession thereof, as they had a right to do, and these answering defendants allege that said plaintiff has no right, title, or interest in said premises, and that said plaintiff has in no way been damaged on account of any of the acts of these answering defendants, or either of them, or at all.

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WHEREFORE, these answering defendants pray:

1. That the plaintiff take nothing by reason of his complaint, and that the same be dismissed.

2. That these defendants be awarded their costs.

3. That these defendants be awarded such other and further relief as the Court may deem just and equitable.

CHRISTENSON & CHRISTENSON

Attorneys for Answering Defendants.

Duly verified and filed on the 25th day of January, 1939.

Exhibit A

AGREEMENT

THIS AGREEMENT, Made in duplicate this 19th day of Feb., 1930, A. D. 1930, by and between R. G. Jolley and Rachel H. Jolley, his wife, of Utah County, State of Utah, the parties of the first part and Frank S. Naylor, of Salt Lake City, State of Utah, the party of the second part; WITNESSETH: That the parties of the first part agree to sell and convey to the party of the second part, his heirs or assigns, and the said party of the second part agrees to purchase, the following described property, situated in the County of Utah, and State of Utah, and State of Utah, to-wit: All of Lots 1, 2, 3, 4, 5, 6, 7 and 8; the West $\frac{1}{2}$ of the Northeast $\frac{1}{4}$; the Northwest

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$\frac{1}{4}$; the Northwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$; the Northwest $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section 32, all in Township 7 South of Range 4 East of the Salt Lake Meridian, containing 481.33 acres, more or less, except, however, that part thereof, described as follows, to-wit: Commencing at the Southwest corner of Lot 8, Section, Township and Range aforesaid, and running thence East along the South line of said Section 32, 12.52 chains to the West line of Private Land Grant known as Special Section No. 69; thence North along the West line 12.12 chains to the Northwest corner of said Special Section 69; thence South 67 deg. 45' West 13.53 chains to the West line of said Section 32, thence south 0 deg. 04' East along the West line of said Section 32, 7 chains to the place of beginning, and containing 11.97 acres, more or less.

Also: All of Special Sections 71 and 72, in Section 33, in Township 7 South of Range 4 East of Salt Lake Meridian, containing 317.32 acres, more or less.

Together with all rights, privileges and appurtenances thereunto belonging, or in any wise appertaining, or used in connection therewith.

26 And together with all water and water rights belonging thereto or used in connection therewith, and especially 25 shares of the Capital Stock of the Springville Irrigation Company, now represented by certificate No. 151.

Second party agrees to pay for said property

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the sum of Eight Thousand (8000) Dollars, as follows, to-wit: Two Thousand (2000) Dollars upon the signing and delivery of this agreement, the receipt of which is hereby acknowledged, and the balance Six Thousand (6000) Dollars, to be paid as follows, to-wit: One Thousand (1000) Dollars, on or before the November 30th day of November, A. D. 1931, and One Thousand (1000) Dollars or more on or before the 30th day of November, 1932, and One Thousand (1000) or more Dollars on or before the 30th day of each and every November until the full amount shall have been paid, together with interest thereon at the rate of six per cent per annum on all deferred payments, said interest payable yearly until the full amount has been paid.

It is distinctly understood and agreed that the interest is not included in the above \$1000.00 but is in addition thereto.

Second party to have possession and the use, benefit and rentals of said property February 19th, 1930, and thereafter so long as he complies with the terms of this agreement, but upon a failure to comply with the same his right to possession will terminate, and the payment made, may at the option of the parties of the first part, be declared forfeited, and this agreement shall be null and void, 60 days grace is hereby given.

First parties agree to furnish, at their own expense, and deliver same to second party, on or

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before October first 1930, an Abstract of title to said property continued to date, and showing the fee and unencumbered, marketable title thereto in said first parties, and said second party shall be entitled to 30 days after same is furnished in which to examine and accept their title thereto.

Should the abstract to said property disclose any clouds or defects in the title, the attorney of the second party to be the judge as to whether or not there are any clouds or defects in the title, said first parties agree to clear any and all such clouds or defects from said title at their own expense within and before the first day of October, 1930.

First parties agree to convey to said second party, his heirs or assigns, an absolute and indefeasible estate, by Warranty Deed, the fee simple title to said premises free and clear of all encumbrances, including taxes for the year 1929, and the first parties to pay all special taxes if any are now existing against said property.

IN WITNESS WHEREOF, the said parties have hereunto set their hands in duplicate, the day and year first above written.

(Signed) R. G. JOLLEY

“ RACHEL H. JOLLEY

“ FRANK S. NAYLOR

Signed in the presence of

(Signed) HUGH JOLLEY

“ EDITH JOLLEY

Exhibit B

MEMORANDUM OF AGREEMENT

WHEREAS, the undersigned R. G. Jolley and Rachel Jolley, his wife, and the undersigned Frank S. Naylor made and entered into a certain agreement in duplicate under date of the 19th day of February, 1930, for the sale by said R. G. Jolley to the said Frank S. Naylor of certain real property described generally as Section 32 and special Sections 71 and 72 in Section 33, Township 7 South, Range 4 East of the Salt Lake Meridian in Utah County, Utah;

AND, WHEREAS, said R. G. Jolley has heretofore sold or agreed to sell two certain lots adjoining what is commonly known as Kelly's Grove;

28 AND, WHEREAS, the description of the property agreed to be sold covers the said lots;

AND, WHEREAS, George G. Kelly now deceased was the owner of an undivided one-fifth interest of the property described in said agreement of sale between the parties hereto as 481.33 acres less 11.97 acres more or less sold therefrom as described in said agreement;

AND, WHEREAS, the predecessors in interest of the undersigned R. G. Jolley, to-wit, one Cyrus N. Sanford, on or about the 16th day of May, 1911, made a certain deed conveying to Knight Investment Company, a corporation, the

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mineral rights in special sections 71 and 72 in Section 33, Township 7 South of Range 4 East of Salt Lake Base and Meridian;

IT IS NOW THEREFORE BETWEEN THE PARTIES HERETO HEREBY AGREED AS FOLLOWS, TO-WIT:

That the title to the lots agreed to be sold by the undersigned R. G. Jolley hereinabove referred to, shall be deemed to be covered by the contract heretofore made and entered into between the parties hereto and said R. G. Jolley shall transfer such title or titles to the undersigned Frank S. Naylor under the said contract and as a part of the real property therein described.

And it is further agreed that the undersigned R. G. Jolley will secure a deed from the Knight Investment Company to the mineral rights in the said special sections 71 and 72 in Section 33, Township 7 South of Range 4 East of the Salt Lake Meridian and that such mineral rights shall be transferred to the undersigned Frank S. Naylor as in the said contract provided when said lands shall be transferred to the said Frank S. Naylor under said agreement.

It is further agreed that R. G. Jolley may transfer and assign to the administratrix of the estate of George G. Kelly, deceased, or to the heirs at law of George G. Kelly, or their assigns, or to any person entitled thereto, the West one-fifth of the property in said contract described

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and agreed to be sold which is located in Section 32, Township 7 South of Range 4 East of the Salt Lake Base and Meridian, which said one-fifth is specifically described as follows, to-wit:

Beginning North 0 deg. 4' West 7 chains from the Southwest corner of Section 32, Township 7 South of Range 4 East of the Salt Lake Base and Meridian; thence North 67 deg. 45' East 13.53 chains; thence North 65 deg. 55' East 0.92 chains; thence North 67.50 chains to the north boundary of said Section 32; thence West 13.36 chains to the Northwest corner of said Section 32; thence South 73.00 chains to the place of beginning, containing an area of 93.87 acres more or less.

As to the real estate hereinabove specifically described which the said R. G. Jolley may transfer to the administratrix of the estate of George G. Kelly, or other persons entitled thereto, the said contract shall be inoperative.

It is further understood and agreed that Frank S. Naylor will pay any and all taxes, assessments and water charges on the premises agreed to be sold falling due after the year 1929.

This memorandum of agreement shall have the same force and effect as though the same were written into and a part of the said contract between the parties hereto under date of the 19th day of February, 1930.

Dated Provo City, Utah, January 28, 1932.

(Signed) R. G. JOLLEY

“ R. H. JOLLEY

“ FRANK S. NAYLOR

Exhibit C

Provo City, Utah, Jan. 28, 1932.

It is agreed between the undersigned that except as the contract of Feb. 19, 1930 is modified by the attached memorandum the same shall be in full force and effect.

It is agreed that there is now due to the undersigned R. G. Jolley under the terms of the said contract the sum of \$1000.00 principal and \$360.00 interest to November 30, 1931; that the undersigned Frank S. Naylor is entitled to credit thereon as follows:

Kelley taxes \$20.00; Water tax \$7.50; account of note favor of Maxfield and assigned to Naylor the sum of \$150.00; total credit of \$177.50, leaving a balance due on the November, 1931, installment under the contract of principal and interest in the sum of \$1182.50.

31 It is agreed that said Naylor shall pay in cash at this time \$882.50, and that the balance of the said sum to wit the sum of \$300.00 will be deposited within 10 days after this date with the Zions Savings Bank and Trust Co. of Salt Lake City to the credit of R. G. Jolley to be paid to him on exhibition of an abstract of title showing a deed from Knight Investment Co. to R. G. Jolley to the mineral rights to special sections 71 and 72 in section 33, Township 7 South of Range 4 East, S. L. M., together with a deed from Henry Weight

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and wife, and a deed from Dallas Holley and wife for lands heretofore deeded to the said Weight and Holley in special sections 71 and 72 hereinabove referred to. It is understood that the abstracts of the property sold will be brought down to date; that the purchaser shall have same for examination for a period of 5 days for the purpose of checking titles and same shall then be delivered to R. G. Jolley; the rights of the parties respecting title as agreed in the original contract are not affected hereby.

(Signed) R. G. JOLLEY

“ R. H. JOLLEY

“ FRANK S. NAYLOR

Exhibit D

Provo, Utah, March 11, 1937.

NOTICE

TO FRANK S. NAYLOR

Salt Lake City, Utah

TAKE NOTICE: That you are in default in making payments according to the terms of a written contract made and entered into between yourself and R. G. Jolley and Rachel H. Jolley under date the 19th day of February, 1930, and memoranda thereto annexed, wherein and whereby you agreed to purchase certain lands of R. G. Jolley situate in Hobbie Creek Canyon in Utah County, State of Utah, which lands are specifically described as follows:

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All of Lots 1, 2, 3, 4, 5, 6, 7 and 8; the West $\frac{1}{2}$ of the Northeast $\frac{1}{4}$; the Northwest $\frac{1}{4}$; the Northwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$; the Northwest $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section 32, all in Township 7 South of Range 4 East of Salt Lake Meridian, containing 481.33 acres, more or less, except, however, that part thereof described as follows, to-wit: Commencing at the Southwest corner of Lot 8, Section, Township and Range aforesaid, and running thence East along the South line of said Section 32, 12.52 chains to the West line of Private Land Grant known as Special Section No. 69; thence North along the West line 12.12 chains to the Northwest corner of said Special Section 69; thence South 67 deg. 45' West 13.53 chains to the West line of said Section 32; thence South 0 deg. 04' East along the West line of said Section 32, 7 chains to the place of beginning, and containing 11.97 acres, more or less.

32

Also: all of Special Sections 71 and 72, in Section 33, in Township 7 South of Range 4 East of Salt Lake Meridian, containing 317.32 acres, more or less.

That you are now in default in the payment of principal and interest, taxes and insurance under said agreement, as of the 2nd day of March, 1937; Principal and interest, \$5,738.15; taxes for the years 1932, 1933 and 1934, \$393.32; insurance premiums, covering fire insurance on the buildings on the premises hereinabove described for the years 1936 and 1937 in the sum of \$28.58; together with the general taxes for the years 1935 and 1936 in the total sum of \$173.47, as of this date;

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together with delinquent water taxes on said premises in the sum of \$.....; together with 6% interest on the deficiency of interest payments under said contract as shown by your payments thereon and the amounts due under said agreement.

You are hereby required to make any and all payments agreed in the said agreement to be made by you, both as to principal and interest and taxes, assessments and insurance against said lands and any amounts due and unpaid as assessments against water rights used in connection with or on said lands so agreed to be sold and to pay the whole thereof on or before forty-five days from and after the date of this notice and its service upon you, and in the event of your failure to pay any and all such amounts in which you are in default within said period of forty-five days, then your interest in the said contract and in the said land and water right agreed to be sold, shall be, and is hereby, declared forfeited as by the terms of said contract is specifically required, and you will be required to make delivery of said lands and property to the undersigned as executor of the Last Will and Testament of R. G. Jolley, deceased, and to the undersigned Rachel Jolley, as is in said contract specifically provided, and said contract, if you fail to comply with this notice within the time stated, shall be, and is hereby, declared void and of no further force or effect.

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Rachel H. Jolley

and

Hugh K. Jolley

William S. Jolley

As executors of the Last Will and
Testament of R. G. Jolley, deceased.

34 Notice issued May 20, 1937 for demand of im-
mediate possession.

35 Notice of forfeiture, August 16, 1937.

37 Demand for possession, September 17, 1937.

[TITLE OF COURT AND CAUSE]

REPLY

40 Comes now the plaintiff above named, and
makes reply to the affirmative matters alleged as
defenses to the complaint herein, as follows:

Plaintiff admits that subsequent to the execu-
tion of the original agreement set forth in the
complaint, to-wit: on the 20th day of January,
1932, said agreement was modified to the extent
set forth in Exhibit B attached to the answer
herein, by making said contract inoperative as to
93.87 acres of land, and by permitting the defend-
ants to transfer so much of said land to the Kelly
estate, and by such transfer to clear the title to
the remaining 4/5 of said land, but plaintiff denies
that said transfer was made or the title to the re-
maining 4/5 of said land cleared until long after
said agreement. Except as admitted, plaintiff

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denies the affirmative matter set forth in paragraph No. 3 of the answer.

Plaintiff denies the allegations of paragraph 1 of the affirmative defense, admits the allegations of paragraph 1 as of the further affirmative defense, admits the allegations of paragraph 2 of the additional affirmative defense, admits that plaintiff and defendants agreed as to the amount of certain installments payable upon contract marked Exhibit A, but denies that an agreement was made fixing the total amount due upon said contract. Denies the allegations of paragraph 4 in the further affirmative defense. Admits that plaintiff paid the amounts due on said contract, Exhibit A, up to January 28, 1932.

Except as admitted, this plaintiff denies the allegations of paragraph 5 and affirmatively alleges that while said contract was in full force and effect he demanded abstract of title showing clear title to all of said property except 93.87 acres, referred to in Exhibit B attached to the defendants' answer herein, and was ready, able, and willing to pay the total purchase price of said property upon delivery to him of an abstract showing clear title thereto and a deed of conveyance thereof, and defendants failed and refused to furnish such abstract or deed.

Admits that repeated demands were made by defendants upon plaintiff for payment of the entire purchase price of all of said property without

Trans.

deductions for the elimination of 93.87 acres of said land, and alleges that said demands were made upon plaintiff by defendants while defendants were in default in the performance of said contract in that they had not furnished an abstract of title thereto for examination by plaintiff and had not cleared title in accordance with the terms of said contract, Exhibit A to plaintiff's complaint.

Admits service of notice marked Exhibit E; admits the service of notice marked Exhibit F; admits the service of notice marked Exhibit G, and in this connection plaintiff alleges that at the time of the service of said notices defendants were in default in the performance of said contract.

Plaintiff admits that he has not claimed the repossession of said premises for the reason that he was compelled to accept the wrongful rescission of said contract by defendants and to rely upon his right to damages for breach thereof.

Plaintiff admits that defendants terminated their said contract and alleges that such termination was wrongful, and alleges that it is subjected to said defendants to damages for wrongful rescission of the said contract.

Admits that defendants elected to declare said contract null and void and alleges that said election was wrongful and that plaintiff thereupon became entitled to damages as prayed in the complaint herein.

J. D. SKEEN, E. J. SKEEN
Attorneys for Plaintiff.

Duly verified and filed on the 26th day of
October, 1939.

[TITLE OF COURT AND CAUSE]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, and leave of court
having first been had and obtained, now amends
his complaint by adding thereto after the second
unnumbered paragraph of page 3 of the following:

That on or about the 4th day of June, 1937,
the plaintiff notified M. R. Straw, who was then
acting as attorney and agent of the Defendants,
Hugh K. Jolley and William S. Jolley, executors
of the estate of Reuben G. Jolley, deceased; that
he had made a contract of sale of all of the land
described in the complaint herein and that upon
delivery to him of an abstract of title of said
property showing a clear and marketable title
thereto, that he would pay the entire balance of
the amount due or to become due upon the con-
tract of purchase of said land and plaintiff on or
about said date demanded of the said M. R. Straw,
as attorney and agent of the said executors that
they furnish him an abstract showing clear title
to said property and upon payment of the total
consideration that they execute and deliver to
him a good and sufficient deed of conveyance of
said property, and plaintiff was thereafter noti-

43

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fied by the said M. R. Straw that an abstract of title of said property would not be furnished by reason of which plaintiff was unable to sell said land.

J. D. SKEEN, E. G. SKEEN
Attorneys for Plaintiff.

Duly verified and filed on the 27th day of October, 1939.

[TITLE OF COURT AND CAUSE]

BILL OF EXCEPTIONS

10 J. W. Stringfellow called as witness for the
plaintiff. Testified was employed in June of 1937
to investigate title to the Jolley land under a con-
tract between the Jolleys and Naylor. Had no
11 opportunity to examine abstract. Went to Provo
with Naylor to see Mr. Straw, as attorney repre-
12 senting the Kelley estate and the Jolley estate.

Witness withdrawn and Frank Naylor testi-
fied. Had several conversations with Reuben
Jolley and after his death with Hugh Jolley. Was
14 told by Mr. Jolley that Straw was handling their
business. Jolley told him the same as his father
told me, "that it was only verbal agreement with
Kelly. Mr. Jolley told me that Straw was their
17 attorney and he was seeing to it. He was taking
care of it." The Jolleys said they were trying to
get straightened up with Kelly and wanted Kelly
18 to take ninety acres off of the West and give

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19 back the undivided one-fifth interest and Jolley
let him know that Straw was handling the busi-
ness. "That Straw was going to get it exchanged
with Kelly." Came to Provo in June of 1937
and saw Straw. He talked to Jolley over the tele-
phone. At that time Straw was a partner of
Christenson, Straw and Christenson. Talked to
Straw with respect to the land. Visit to Straw's
office was after the death of Reuben G. Jolley
22 and the appointment of executors.

26 Thereupon plaintiff's exhibit "D" was marked
for identification.

Witness withdrawn, J. W. Stringfellow con-
tinued. Received a letter through the mail, iden-
tified as Exhibit "D." Received through the
mail directed to J. W. Stringfellow the next day
28 after witness was in Provo with Naylor.

Exhibit D received in evidence. Exhibit D is
as follows:

June 4, 1937

J. W. Stringfellow
310 Utah Oil Building
Salt Lake City, Utah

Dear Sir:

In the matter of Jolley, et-al vs. Naylor,
Mrs. Jolley is a party in interest under the
contract and as the situation resolves itself,
I find myself unable to secure the Abstract
for delivery to you or to the abstractor. If
Naylor is a bona fide purchaser, it is possible
that the Abstract may be examined here for
the purpose of determining what the title is

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in respect to the lands under contract, but under the circumstances, I am not able to control the situation nor specifically state what Naylor may be able to expect in the nature of cooperation under the facts in the case. If it is possible for Naylor to make the deal contemplated, or any deal with respect to the cleanup of the matter, I shall do all that I personally can to facilitate such action.

Regretting my inability to comply with the request made, I am,

Very truly yours,
CHRISTENSON STRAW &
CHRISTENSON
By Straw

MRS:HO

Witness further testified made an examination of the record in the County Recorder's Office prior to seeing Mr. Straw and on the same day.
28 Found title to what was called the hill land in
the name of Kelly and Jolley. Straw said he
29 would call up Jolley and he did.

Stipulation that the record showed Christenson, Straw and Christenson filed a petition for the probate of the will of Reuben G. Jolley and that Mr. Straw was attorney for the executors until his death and since his death the firm of Christenson and Christenson have been the attorneys.

A. "Mr. Straw said that he would call up Mr. Jolley with respect to letting us have the abstract. He did. And he said to the party on the other end, 'Mr. Naylor and

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31

Judge Stringfellow are here. They say they have a purchaser for the ranch, but it is necessary for them to have the abstract.' After a pause, I should say two or three minutes, he followed up, 'Well, they say it is a bona fide purchaser, and surely no one will buy the property without an opportunity to look at the abstract and to examine its title, and we ought to let them have it.' After a pause of another few minutes, he hung up and he said that Mr. Jolley said that Mr. Naylor could not have the abstract but that Stringfellow could. But I was to return it after a period of time, and I would be held responsible for its return. I do not recall as to the length of the time that we were to have it. And he said that he would bring the abstract down that afternoon. That it was now in the safety deposit box and that he couldn't get at it. He said he preferred to have the abstract brought to date here because he knew an abstracter who had done a lot of work for him and he could get some concession on the price. That he would give it to the abstracter, find the bill—we had previously agreed if they would do that we would pay the cost of bringing it to date. That he would send us the bill. We were to send him the money, and then he would send us the abstract.

32

Q. After that conversation did you hear any further from Mr. Straw other than the letter?

A. Nothing more than the letter which he sent the next day excusing himself from sending the abstract.

Q. Is that all your connection with the letter?

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A. That is my whole connection with the matter.”

CROSS EXAMINATION

Went in the record in the cursory way and understood there was difficulty. Had been advised that there was a tract of land something over 700 acres which was supposed to have been owned by Jolley but it turned out there was an undivided interest in the Kelleys. Understood some arrangement was entered into whereby Jolleys agreed to transfer a certain amount of acreage from one end of the ground and Kelleys would in turn deed to Jolleys their interest in the balance of the ground. Kelleys interest had never been transferred. They hadn't completed that and examined the record and found something to that effect. Did not examine a petition made in 1934 asking authority to deed certain lands to the Kelley estate and then in turn the Kelley estate deeded certain interest interest in those particular lands. Did not see the order dated September, 1934.

“Mr. Straw said he would not have the order made until he was paid his fee. He had gone as far as he proposed to.” He didn't see the order. He wouldn't proceed in the Kelly estate until he had been paid some money.

“And I tried to urge upon Mr. Straw that that put Mr. Naylor in a very bad way, and did not

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35 straighten the title as far as he was concerned.”
He said he hadn’t been paid and he wasn’t going
to go any further until he was. Demanded an
abstract. Had not made a legal tender.

36 A. “We said we had a bona fide purchaser, who was willing to purchase the property, and not pay only the arrears that Mr. Naylor was in, but we thought that sufficient money would be obtained in the sale to pay out the contract in its entirety.

Q. So you wanted to sell it before you determined how much was going to be paid?

A. What we wanted to do was to pay that contract out, and raise that money, and we thought—I, at least, thought he had a right to use that contract to raise that money.

Q. He had the contract, didn’t he?

A. He had a contract that wouldn’t give them a clear title to the property. One he couldn’t use at all.

Q. Well, he wanted to have the abstract of title brought up to date, show good title, before he paid it?

A. Showing good title. And he promised to pay not only the arrears, but—by the way, Mr. Straw said, ‘That is all we want.’

Q. It was on a promise he expected to sell it?

A. No, he deamnded, of course, the abstract as a matter of right. I, as a lawyer, had advised Mr. Naylor that he was entitled to the abstract. That he was entitled to have the abstract given to him so that he could determine as to the validity of the title.

Q. Did you find any other objection to the title except this?

A. Not a thing. I didn't examine the title. Never had an opportunity to examine the title. Never could get hold of the abstract.

Q. Did Mr. Straw tell you that he would get the title and you could examine it if you wanted to?

37

A. No. He said he would get the abstract, and that is why he phoned Jolley.

Q. I know. And he said you could take it, but you volunteered to bring it up to date.

A. We had told him here in the court room if he would do that we would pay the expense of bringing it up to date.

Q. But you never did send any money to pay for it?

A. He never sent us any bill to what it would be brought to date for. We would have been very glad to pay that.

Q. And you have never heard anything about it since?

A. No, nothing. Not a thing.

Q. Now, you said that Mr. Naylor exhibited to you a notice?

A. Yes. A notice that purported to be a—

Q. Demand of payment?

A. Demand of payment. Yes, a demand of payment of arrears. I am not sure that that notice, Mr. Christenson—if I recall right it was what I call a rather ambiguous notice, one that I did not consider was, as a matter of law, a notice of forfeiture.

Q. Would you recognize the notice?

A. Oh, I don't know that I would, because they are drawn largely in the—they are drawn—so much similarity to them, but—

Q. You said this was on the fourth of June?

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A. Well, I was down here the day previous to having received that letter. This notice that was, that Mr. Naylor brought in to me probably was brought in, oh, a week or probably even more than that prior to my coming down here. I wouldn't be positive on a thing like that.

Q. You don't know but what it might be dated on May 20, 1937? Don't you remember that?

A. No, I wouldn't. I recall as to the date when I was here merely from the date that was on the letter I received following my visit here. And I know, as a matter of fact, that that was the following day to my being here.

Q. Now, you stated that you demanded the abstract of title, showing good title to this land less the ninety-three acres?

A. Yes.

Q. And if they would give you a good abstract of title you intended to sell the property and pay out?

A. Yes.

Q. Now, that is all you know about it. Nobody had put up the money for it?

A. Well, I can only answer that—from my personal knowledge I say nobody. But I have information about it.

Q. You didn't have an personal knowledge?

A. Wasn't personal knowledge of mine.

Q. It was something Mr. Naylor told you, that he had a good faith purchaser?

A. Yes.

Q. That is all you knew about it?

A. Yes."

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Deed from Hugh K. Jolley and William S. Jolley, the executors to George J. Kelley, consideration \$1.00 covering the following:

39 Beginning North 4' West 7.00 chains from
40 the Southwest corner of Section 32, Town-
 ship 7 South, Range 4 East S. L. M.; thence
 North 67°45' East 13.53 chains; thence North
 65°55' East .92 chains; thence North 67.50
 chains to the North boundary of said Section;
 thence West 13.36 chains to the Northwest
 corner of the said Section; thence South
 along the Section line 73.00 chains to begin-
 ning. Area 93.87 acres.

Dated and acknowledged July 14, 1937.

Executor's deed from Marilla E. Kelley to
Hugh K. Jolley and William S. Jolley, executors
covering the following:

41 Lots 1, 2, 3, 4, 5, 6 and 7, and the West ½
42 of Northeast ¼; Northwest ¼ of Southeast
 ¼ East ¼ of the Northwest Quarter of Sec-
 tion 32, Township 7 South, Range 4 East
 SLM.; and also beginning North 4' West
 12.49 chains and East 13.36 chains from the
 Southwest corner of Section 32 Township 7
 South of Range 4 East, S.L.M.; thence North
 67.50 chains to the Section line; thence East
 6.64 chains; south along Center of ¼ Sec-
 tion 64.68 chains; thence South 66°55' West
 7.22 chains to the place of beginning.

Dated and acknowledged July 23, 1937.

43 Frank S. Naylor recalled, identified receipts

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as exhibit "C" being receipts for money paid on account of the contract.

45 Did not remember whether he paid \$300.00 as provided for in supplementary contract.

47 Made arrangements to sell the place and had a buyer for it in the spring of 1937 for \$12,000.00. Made written contract received \$275.00. At the time he employed Stringfellow, when into possession of the property, built one mile of fence with eight strands of wire and cedar posts at a cost of \$400.00 or \$500.00. Built a mile of fence of 48 four strands. Put woven wire around the house, built a barn, remodeled the house. The wire cost \$76.00 or \$100.00 with cedar post. Barn cost \$1500.00. Put new siding on the house at a cost 49 of \$150.00. Cleared land and put it in strawberries in 1937 about 7 acres. Cost of clearing would be in the neighborhood of \$400.00. Some land planted to lettuce. Leased land to a Jap in 1937 50 who agreed to pay \$1200.00. Paid \$100.00; still owed \$1,000.00.

51 Was on the ground in 1937, saw a bunch of horses and sheep that was turned in on the Jap's crop. They were turned in by Mr. Jolley and a man named Elmer Jackson. There were seven or eight horses and two mules, 100 to 125 sheep. They ruined the Jap's crop which consisted of string beans, spinach and lettuce. They also ruined the raspberry and dewberry bushes by running in them.

CROSS-EXAMINATION

Did not remember when Jolleys took possession but it was after that when the livestock was turned in. Made an effort to get the property back. Had the money ready if he could have gotten the title to the property. Did not have the \$12,000.00 in hand but had a written contract. Alvie Scoville of Ogden was the purchaser. Lived at Ogden. He paid \$275.00. Repaid part of it. Had a written contract. Lost it. Have tried to find it. It was signed by Scoville. Did not remember the exact date but it was right at the time he was down there just before or just after he was there with Stringfellow. Notices of the termination of the contract were dated before that. He went to Scoville and offered to pay him the money at his place of business.

A. "I told him I had a buyer for the ranch if we could get the title cleared up; yes, sir.

Q. What did he say?

A. He told me to bring the money and they would clear the title up.

Q. And you told him you wanted the title cleared up?

A. I told him I couldn't find a purchaser who would put up twelve thousand dollars until he seen what he was buying; that he wouldn't put up twelve thousand for a piece of property that somebody owned an undivided one-fifth interest in.

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Q. That is argument. I am not asking you for that. That is a lot of money.

A. Yes.

Q. Did you offer him any money at all?

A. At that time?

Q. Yes.

A. No, sir.

Q. You just told him you had a purchaser?

A. Yes, sir.

Q. And if you could get a clear title and a deed that you could get the money?

A. I didn't want the deed. I wanted to show a clear title to it.

56 Q. Well, you knew it was clear excepting with respect to the 93 acres, didn't you?

A. I knew it wasn't clear with the man owning an undivided one-fifth interest in it."

57 You knew the Kelleys claimed an undivided one-fifth in the ranch land. Did not know it when he made first contract. Didn't know it until Kelley told him and Jolley told him there was a verbal agreement. Knew of it before 1932. Took possession of the 93 acres. Used it all and Kelley used it all. Made an agreement for Kelley's
58 administrator to deed one-fifth interest and Jolleys administrator to deed 93 acered provided they would do it right away. They didn't do anything toward it. Made the agreement with Jolley in Straw's office. That was in 1932 and had said something about it several times. Understood one-fifth to be 93.87 acres and that the con-

Trans.

tract should be modified so that they could deed that to the Kelleys. Then Kelleys would deed the balance to Jolleys. Did not intent to get the 93.87 acres but did intend to get the title straightened out so he could do something with the land. Paid \$882.00 and was to hold \$300.00 until he had an opportunity to examine the abstract. Got an abstract of title about February 1933 to 317 acres and paid the \$300.00.

Witness testified as to receipts for money paid. Went to Hugh Jolley with respect to getting clear title. Wanted to get it straightened out so that he could do something with it. Kelley was running sheep over the entire field. Made complaint to Hugh Jolley every spring about the title. Received notices demanding payment. Witness testified with respect to building fences and making other improvements upon the property.

Abstract produced by defendant, marked exhibit one, and witness testified with respect to entries therein contained.

Witness testified with respect to proceedings before a referee in bankruptcy. Went to Mr. Jolley several times about the abstract. Did not see him when he brought Stringfellow down. Went to Straw's office. The only thing Straw said was, "we will get that," meaning the abstract, "up to you." Saw Jolley at the place when they were taking possession. His brother was in the house. He said bring the money along and we will get you the abstract.

REDIRECT EXAMINATION

112 Stipulation that general denial would go to the
amendment to the complaint. Witness testified
further as to damages on redirect examination.
Defendants exhibit one being abstract No. 14953
was offered in evidence by plaintiff. The ab-
119 stract furnished covered the Knight property, the
Weight property and the Holley property.

The Jolleys were supposed to acquire the Kel-
ley land and that was another abstract. Two
separate pieces of land and two separate ab-
stracts. Witness had never seen the other ab-
stract on the other parcel of land. Case sub-
mitted whereupon the defendant made the fol-
lowing motion:

120 “JUDGE CHRISTENSON: At this
point, if your Honor please, I move the court
for a non-suit upon the ground and for the
reason that under the evidence and under
the pleadings the plaintiff has not shown that
he is entitled to any relief.

Upon the further ground that the evi-
dence conclusively shows in this case that the
defendants have made allegations in their
answer, and they have been admitted by the
plaintiff, of a complete defense to the cause
of action.

121 That it now shows that the plaintiff has
rested his case upon the complaint, the alle-
gations of the complaint, and yet in his reply
he admits all of the allegations practically of
the answer, and if those allegations in the
answer are true, it follows that the plaintiff

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would not be entitled to recover upon his complaint, because it does not state a cause of action.

(Argued)

THE COURT: The motion for a non-suit will be granted.

MR. J. D. SKEEN: May we have an exception?

THE COURT: Yes.”

JUDGMENT OF NON-SUIT

This cause came on regularly for trial before the Court, Hon. Dallas H. Young, Judge, sitting without a jury, on the 26th day of October, 1939. The trial was continued to the 27th day of October, 1939, when the same was concluded.

44-B The plaintiff appeared in person and by his attorneys, Skeen and Skeen. The defendants, Rachel H. Jolley and Hugh K. Jolley, one of the executors of the estate of Reuben G. Jolley, deceased, appeared in person and by their attorney, A. H. Christenson of the firm of Christenson and Christenson. Said attorney also represented the other defendants in said action. The plaintiff submitted his evidence in support of his complaint in chief, and then rested, whereupon, the defendants, through their attorney, moved the Court to grant a non-suit against the plaintiff and to dismiss the plaintiff's complaint, for the reason set out in said motion. Said motion was argued by respective counsel and then submitted to the Court for decision.

Trans.

The Court now, after having considered the pleadings in said cause, the admissions made, and the evidence submitted by the plaintiff, and the arguments of respective counsel, and being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: That the said motion of the defendants be, and the same is hereby granted, and that the plaintiff's complaint be and the same is hereby dismissed; that the defendants be, and they are hereby awarded their costs taxed at \$.....

Done in open Court the 27th day of October, 1939.

BY THE COURT:

Dallas H. Young
JUDGE

Order extending time to serve and file the Abstract of Record and Assignment of Errors to May 15, 1940.

47 Order extending time to serve and file the Bill of Exceptions to December 27, 1939, dated the 18th day of November, 1939.

48 Order extending time to serve and file the Bill of Exceptions to January 27, 1940, dated the 9th day of December, 1939.